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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Appellant,

v.

JOSE ALFREDO PEREZ,

Defendant and Respondent.

E048517

(Super.Ct.No. RIF120638)

OPINION

APPEAL from the Superior Court of Riverside County. Gary B. Tranbarger, Judge. Affirmed in part; reversed in part.

Rod Pacheco, District Attorney, and Elise J. Farrell, Deputy District Attorney, for Plaintiff and Appellant.

Christopher Blake, under appointment by the Court of Appeal, for Defendant and Respondent.

This opinion constitutes this court's third instance of addressing this case. In this court's second opinion, we directed the trial court to vacate its order dismissing the

charges against defendant (Pen. Code, § 1385),<sup>1</sup> and instructed the court to set a hearing for defendant's motion for a new trial. (*People v. Perez* (Oct. 17, 2008, E044302) [nonpub. opn.].) The trial court granted defendant's motion for a new trial. (§ 1181.) The Riverside County District Attorney's (the district attorney) Office contends that the trial court abused its discretion by granting defendant's motion because (1) the court considered impermissible factors when rendering its decision; (2) the trial court applied the incorrect legal standard; and (3) the court's order is not supported by substantial evidence. We affirm the order granting a new trial in part, and reverse in part.

## FACTUAL AND PROCEDURAL HISTORY

We present the facts related to the offense, followed by the procedural history of the case.

### A. FACTS

On November 20, 2004, the victim lived on Pecan Place, in Moreno Valley. At the time, the victim was a member of the East Side Riva gang. A street gang known as Barrio Pecan was associated with Pecan Place. Barrio Pecan had gang conflicts with Florencia 13—the two gangs exchanged gunfire with one another over a period of time.

On November 20, 2004, the victim's younger brother arrived home and told the victim that he had been followed home by members of Florencia 13, who were in a white Honda Civic. The victim exited the house because he wanted to fight the members of Florencia 13. The victim approached the people in the white Honda Civic.

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<sup>1</sup> All further statutory references are to the Penal Code unless indicated.

Defendant exited the vehicle. The victim recognized defendant from Moreno Valley High School and from various parties they had both attended. The victim and defendant exchanged profanities. At one point, defendant said, “[O]h yeah? Oh yeah?” and drew a firearm from his sweater pocket. The victim saw defendant point the gun “straight at” the victim. The victim saw defendant hold the gun sideways as he pointed it at the victim.

After seeing the gun, the victim stepped backwards and “jumped” behind the side of a truck. The victim crouched down on his knees, with his hands on the ground. A few seconds later, the victim heard a gunshot and then the victim heard the car “squeal, like peeling out,” and leave the area. The victim’s brother heard the victim and defendant arguing, and also heard the gunshot; however, he did not see the shot being fired.

Riverside County Sheriff’s Deputy Anthony Johnson responded to a call of shots fired on Pecan Place, on November 20, 2004. Deputy Johnson searched the area for a shell casing or bullet strike; however, it was dark outside during the search, and the deputy did not find a bullet strike or shell casing.

Defendant testified that he was in a car on Pecan Place on November 20, 2004, at approximately 5:30 p.m. Defendant saw the victim approach the vehicle. The victim said to the people in the car, “Stop. Stop. Get out of the car.” Defendant exited the car. Defendant recognized the victim. Defendant stated that he removed a firearm from his pocket while arguing with the victim. Defendant said that the victim “glanced [at the

gun] and then ran.” Defendant testified that he shot the firearm towards “the sky” as a “warning shot, self-defense.”

In rebuttal, Deputy Johnson testified that defendant waived his *Miranda* rights after being arrested. For approximately one hour, defendant denied being involved in the shooting; however, defendant ultimately told the deputy that he went to Pecan Place “for retaliation.” Defendant also told the deputy that he chased after the victim when the victim tried to hide from defendant. Defendant said that while he was chasing the victim, defendant shot the gun into the air.

B. PROCEDURAL HISTORY

1. *TRIAL COURT*

On November 3, 2005, defendant pled guilty to (1) taking or driving a vehicle without the owner’s consent (Veh. Code, § 10851, subd. (a)); (2) buying or receiving a stolen vehicle (Pen. Code, § 496d); and (3) resisting, delaying, or obstructing a peace officer (Pen. Code, § 148, subd. (a)(1)). On November 11, 2005, a jury found defendant guilty of attempted murder (Pen. Code, §§ 664, 187, subd. (a)), and assault with a firearm (Pen. Code, § 245, subd. (a)(2)). In regard to both the attempted murder and assault counts, the jury also found true two enhancements: (1) defendant personally and intentionally discharged a firearm (Pen. Code, § 12022.53, subd. (c)); and (2) the offenses were serious felonies (Pen. Code, § 1192.7, subd. (c)(8)). The trial court found true the allegation that the assault was committed while defendant was out of custody on a felony offense. (Pen. Code, § 12022.1, subd. (a)(1).)

On January 6, 2006, defendant moved the trial court for a new trial. (§ 1181.)<sup>2</sup> Rather than grant a new trial, the trial court set aside defendant's convictions for attempted murder and assault, struck the related enhancements, and dismissed both counts. The trial court cited insufficient evidence as the reason for its rulings. In regard to the vehicle crimes and the resisting of a peace officer, the trial court sentenced defendant to state prison for a term of two years.

## 2. *FIRST APPEAL*

The district attorney's office appealed the trial court's ruling. The district attorney contended that (1) the trial court misapplied section 1118.1<sup>3</sup> by dismissing the counts after the matter was submitted to the jury; and (2) substantial evidence supported the convictions. On May 4, 2007, this court issued an opinion concluding that the trial court misapplied section 1118.1 by dismissing the counts after the matter was submitted to the jury. (*People v. Perez* (May 4, 2007, E040520) [nonpub. opn.].) Consequently, this court reversed the judgment and directed the trial court to either: (1) dismiss the case pursuant to the proper legal authority; (2) grant defendant's motion for a new trial; or (3) sentence defendant for the crimes. (*Ibid.*)

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<sup>2</sup> Section 1181 authorizes a trial court to grant a defendant a new trial following a verdict.

<sup>3</sup> Section 1118.1 authorizes a trial court to enter a judgment of acquittal at the close of evidence, before the matter is submitted to the jury.

### 3. *TRIAL COURT—FOLLOWING OUR FIRST DISPOSITION*

On September 14, 2007, the trial court held a hearing on the matter. The trial court interpreted our disposition as directing it to “make clear the statutory authority that [it] rel[ied] on.” The trial court stated that the evidence presented at defendant’s jury trial was “legally insufficient.” The trial court, on its own motion, dismissed the attempted murder and assault convictions in the interests of justice (§ 1385, subd. (a)), due to a lack of evidence. The trial court went on to remark that if this court found substantial evidence supported the jury’s findings, then the matter should be set for a new trial (§ 1181), because the evidence was insufficient.

### 4. *SECOND APPEAL*

The district attorney appealed the trial court’s ruling. The district attorney contended that the trial court erred because (1) substantial evidence supported the jury’s findings; and (2) the trial court failed to give the proper deference to the jury’s verdicts.

This court analyzed the entire record, and concluded that substantial evidence supported defendant’s convictions for assault with a deadly weapon (§ 245) and attempted murder (§§ 664, 187). (*People v. Perez* (Oct. 17, 2008, E044302) [nonpub. opn.], at pp. 19, 27.) In our analysis, we noted that the trial court “reached an erroneous legal conclusion when it ruled that defendant’s actions amounted to a brandishing, but were not an assault with a deadly weapon.” (*Id.* at pp. 18-19.) We also noted that a motion for new trial (§ 1181) could not have been pending after the trial court dismissed the charges in the interest of justice (§ 1385). Consequently, we reversed the trial

court's ruling, and directed the trial court to "set the matter for a hearing on defendant's motion for a new trial." (*Perez*, at pp. 27-28.)

#### 5. TRIAL COURT—FOLLOWING OUR SECOND DISPOSITION

On April 24, 2009, the trial court held a hearing on defendant's motion for a new trial (§ 1181). The trial court granted defendant's motion. The trial court explained that defendant's motion should be granted in regard to the assault with a deadly weapon charge (§ 245) because "the victim as [the trial court] witnessed it described a situation that was a brandishing. Brandishing accompanied by harsh words." In regard to the attempted murder charge (§§ 664, 187), the trial court reasoned that defendant's motion should be granted because "there's absolutely no evidence that [defendant] fired anyplace other than . . . straight into the air."

#### DISCUSSION

We briefly explain how the instant appeal is legally distinguishable from defendant's prior two appeals.

##### A. LEGAL BACKGROUND

In the first appeal, we reviewed the trial court's order granting defendant a judgment of acquittal for insufficient evidence (§ 1118.1). "In ruling on an 1118.1 motion for judgment of acquittal, the [trial] court evaluates the evidence in the light most favorable to the prosecution. If there is any substantial evidence, including all inferences reasonably drawn from the evidence, to support the elements of the offense, the court must deny the motion. [Citations.]" (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 132.)

In the second appeal, we reviewed the trial court’s order dismissing the action against defendant due to insufficient evidence (§ 1385). When a trial court analyzes a motion to dismiss for insufficiency of the evidence, it must review “the entire record in the light most favorable to the verdict” and determine whether there is substantial evidence which would permit any rational jury to find the defendant guilty beyond a reasonable doubt. (*People v. Salgado* (2001) 88 Cal.App.4th 5, 15.)

In the current appeal, we review the trial court’s order granting defendant a new trial because the verdict is “contrary to law or evidence” (§ 1181, subd. (6)). The trial court’s analysis of a motion for a new trial is different than its analysis of a motion for a judgment of acquittal (§1118.1), or a motion to dismiss for insufficiency of the evidence (§ 1385). When deciding a motion for a new trial (§ 1181, subd. (6)), the trial court “independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt *to the judge*, who sits, in effect, as a ‘13th juror.’ [Citations.] If the court is not convinced that the charges have been proven beyond a reasonable doubt, it may rule that the jury’s verdict is ‘contrary to [the] evidence.’ [Citations.] In doing so, the judge acts as a 13th juror who is a ‘holdout’ for acquittal. Thus, the grant of a section 1181[, subdivision] (6) motion is the equivalent of a mistrial caused by a hung jury. [Citation.]” (*Porter v. Superior Court, supra*, 47 Cal.4th at p. 133.)<sup>4</sup>

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<sup>4</sup> We directed the parties to provide supplemental briefing regarding whether the law of the case doctrine prevented the trial court from granting defendant’s motion for a new trial on the basis of the evidence being contrary to the verdict, due to our  
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B. STANDARD OF REVIEW

“The trial court has broad discretion in determining whether the evidence has sufficient probative value to sustain the verdict [citation], and its order [granting a new trial] will not be reversed on appeal ‘absent a manifest and unmistakable abuse of that discretion.’ [Citation.] In reviewing an order granting a new trial based on insufficiency of the evidence, the appellate court reviews the evidence in the light most favorable to the trial court’s ruling, drawing all factual inferences that favor the trial court’s decision. [Citations.] The trial court’s factual findings, express or implied, will be upheld if supported by any substantial evidence. [Citation.] The order will be reversed only if it can be said as a matter of law that there is no substantial evidence to support a judgment contrary to the verdict. [Citation.]” (*People v. Dickens* (2005) 130 Cal.App.4th 1245, 1252, fn. omitted [Fourth Dist., Div. Two]; see also *People v. Lewis* (2001) 26 Cal.4th 334, 364.)

C. DEFENSE EVIDENCE

We present the defense evidence to assist in analyzing whether the trial court’s factual findings are supported by substantial evidence.

Defendant testified that he was travelling on Pecan Place because it was a shortcut to his destination. Defendant stated that he was not a gang member and that he

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determination in the second appeal that substantial evidence supported the jury’s verdicts. After reviewing the parties’ supplemental letter briefs, we will not base our decision in the instant matter on the law of the case doctrine, due to the different legal analyses involved with a motion to dismiss (§ 1385) and a motion for a new trial (§ 1181, subd. (6)).

did not associate with any members of Florencia 13. Defendant testified that he did not know the names of the people that were in the car with him on Pecan Place; however, moments later, defendant testified that his “friend,” i.e., the driver, made two U-turns on Pecan Place, which caused them to drive past the victim’s house more than once. As the victim stood outside yelling towards the car, a person in the car gave defendant a gun. Defendant placed the gun in his pocket. Defendant testified that he did not know what type of gun was given to him.

Defendant testified that he exited the car and exchanged profanities with the victim. Defendant said that he exited the car and confronted the victim because he was scared; defendant explained that he did not leave the scene because “when you’re scared you just do crazy things.”

Defendant stated that after he argued with the victim, he retrieved the firearm from his pocket and pointed it at the ground. Defendant recalled that the victim looked at defendant and the gun for approximately two seconds, and then the victim ran to hide. Defendant stated that he “went after” the victim, when the victim ran away. Defendant testified, “I didn’t quite chase him. I just took like four steps and then four steps back.”

Defendant said that, approximately 10 seconds after the victim ran to hide, defendant “went back towards the car and shot in the air and left.” Defendant stated that he did not know whether the gun was loaded prior to shooting it, and that he “just shot up in the air and [was] going to see what happened.”

D. ASSAULT WITH A DEADLY WEAPON

“Assault is ‘an unlawful *attempt*, coupled with a present ability, to commit a violent injury on the person of another.’ (§ 240, italics added.)” (*People v. Williams* (2001) 26 Cal.4th 779, 785.) Assault is a general intent crime, and therefore, a prosecutor need only show that the defendant committed an intentional act with knowledge that the act, by its nature, will probably and directly result in the application of physical force against another. (*Id.* at p. 790.)

The defendant’s testimony reveals that defendant intentionally held a gun and “went after” the victim following an exchange of profanities. Defendant testified that he did not leave the scene because “when you’re scared you just do crazy things.” Holding a gun during a verbal argument, and chasing the victim as he runs away, are intentional acts, which show an ability to commit a violent injury on the victim. Defendant’s testimony that “you just do crazy things” when you are scared demonstrates knowledge that his acts, by their nature, would probably and directly result in the application of physical force against the victim, because he seems to understand that chasing a person with a gun has the potential for “crazy” consequences.

In sum, when viewing all of the evidence in the light most favorable to the trial court’s ruling, we are unable to find substantial evidence to support a judgment contrary to the verdict. Accordingly, we conclude that the trial court abused its discretion by granting the motion for a new trial, in regard to the assault with a deadly weapon charge (§ 245).

The trial court found that the evidence offered in support of the assault with a deadly weapon charge was contrary to the verdict because there was no evidence of a threat, “[n]o statement of intention to use the gun[, n]o demand being made by the defendant towards the victim of: Do this or else.” We do not find the trial court’s analysis convincing because a verbal threat or demand is not an element of assault with a deadly weapon.

Defendant argues that the trial court’s grant of his motion should not be reversed because the trial court’s conclusion was reasonable, and therefore, not an abuse of discretion. Specifically, in his respondent’s brief, defendant writes, “[T]he evidence taken as a whole, does support the trial court’s conclusion that the defendant did nothing more than waive his gun around, brandishing it in an unlawful manner.” Despite this clear argument, defendant fails to refer to any particular testimony or other evidence that supports his position; and defendant does not cite to the record. Accordingly, we are not persuaded by defendant’s argument, because he has not shown that the trial court’s factual findings are supported by substantial evidence.

E. ATTEMPTED MURDER

1. *ANALYSIS*

“‘Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.’ [Citation.]” (*People v. Stone* (2009) 46 Cal.4th 131, 136.) “‘The crime of attempt sanctions what the person intended to do but did not accomplish . . . .’” (*Ibid.*)

Defendant testified that he “went after” the victim, but ultimately shot the gun into the air. Defendant’s testimony is substantial evidence that he did not intend to kill the victim, because it can reasonably be inferred that defendant would not have shot the gun into the air if he intended to kill the victim. Accordingly, substantial evidence supports the trial court’s factual findings, and therefore, the trial court did not abuse its discretion by granting defendant’s motion for a new trial in regard to the attempted murder conviction (§§ 664, 187).

## 2. *THE PEOPLE’S ARGUMENTS*

### a) Credibility

The People contend that substantial evidence does not support the trial court’s factual findings because defendant’s testimony was “self-serving [and] incredulous.” The People set forth a variety of reasons for finding that defendant is not a credible witness. We are not persuaded by the People’s argument for two reasons. First, the trial court, not the appellate court, has the authority to consider the credibility of witnesses on a motion for new trial. (*People v. Ramirez* (1934) 1 Cal.2d 559, 563.) Therefore, defendant’s credibility is not relevant to our analysis of the issue.

Second, the People have not shown that defendant’s testimony, that he shot the gun into the air, is inherently improbable or impossible. The settled rule for appellate review is: “The credibility of witnesses is a matter for the trier of fact and if the result reached below is supported by substantial evidence, it cannot be disturbed on appeal unless the testimony is inherently impossible or improbable. [Citations.]” (*People v. Lopez* (1959) 169 Cal.App.2d 4, 8.) The People’s argument provides many reasons for

concluding that defendant is not credible; however, the People have not demonstrated that it is inherently impossible or improbable that defendant shot into the air.

b) Judicial Bias

Next, the People argue that the order for a new trial should be reversed because the trial court considered impermissible factors when making its ruling. The People contend that the trial court demonstrated bias against the prosecution because the trial court repeatedly expressed its belief that the case was overcharged. The People assert that the trial court granted the motion for a new trial in an attempt to usurp the charging authority of the prosecutor.

When judicial bias is raised as an issue on appeal, the “role of a reviewing court ‘is not to determine whether the trial judge’s conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge’s behavior was so prejudicial that it denied [the People] a fair, as opposed to a perfect, [hearing]. [Citation.]’” (*People v. Harris* (2005) 37 Cal.4th 310, 347.)

At the hearing on the motion for a new trial, the trial court indicated that it intended to grant defendant’s motion, but the court asked if the parties would like to argue the motion before the trial court ruled. The prosecutor made his argument without interruption from the court. When the trial court made its ruling on the motion, it referenced the evidence offered at trial and legal authority. While it would have been better for the trial court to not comment on its belief that the case had been overcharged, it does not appear that the trial judge was prejudiced against the prosecution, because

the trial court’s decision was supported by the evidence, and within its discretion. In sum, we do not find the People’s argument persuasive.

c) *People v. Knoller*

i) *Background*

The People contend that the instant case is similar to the case of *People v. Knoller* (2007) 41 Cal.4th 139 (*Knoller*). In *Knoller*, a husband and wife were found guilty of a variety crimes after their dogs attacked and killed their neighbor. (*Id.* at p. 142.) The trial court denied the husband’s motion for a new trial, but granted the wife’s motion in regard to her conviction for second degree murder—the murder conviction was based upon a theory of implied malice. (*Ibid.*) The trial court reasoned that the motion for a new trial should be granted in regard to the murder conviction because the evidence reflected that the wife lacked awareness that there was a high probability her conduct would cause the death of another person. (*Ibid.*) The trial court also commented, “[A] great troubling feature of th[e] case” was that the husband had never been charged with murder, but the wife was convicted of murder. (*Id.* at pp. 150-151.) Before granting the motion, the trial court remarked, “[T]he equal administration of justice is an important feature in any criminal court. That played a role as well.” (*Id.* at p. 151.)

The appellate court reversed the trial court’s order granting a new trial. (*Knoller, supra*, 41 Cal.4th at p. 142.) The appellate court directed the trial court to reconsider the motion “in light of the Court of Appeal’s holding that implied malice can be based

simply on a defendant's conscious disregard of the risk of serious bodily injury to another." (*Ibid.*, italics omitted.)

Our Supreme Court accepted the wife's petition for review. One of the issues considered by our high court was whether the trial court abused its discretion in granting the motion for a new trial due to the evidence being contrary to the verdict (§ 1181, subd. (6)). (*Knoller, supra*, 41 Cal.4th at p. 142.) The Supreme Court concluded that "the trial court applied an erroneous definition of implied malice in granting [the wife] a new trial on the second degree murder charge." (*Id.* at p. 157.) Further, our Supreme Court held that charging the wife with murder, but not the husband, was "a permissible exercise of prosecutorial discretion, not grounds for a new trial." (*Id.* at p. 158.)

ii) *Analysis*

The People assert that the trial court in the instant case made errors similar to the trial court in *Knoller*. The People contend that the trial court in the instant case stated it was relying on defendant's undisputed testimony that he shot into the air as the basis for granting defendant's motion; however, the People assert that the trial court's true reason for granting the motion was to usurp the charging authority of the prosecutor.

We do not find the People's argument persuasive. The trial court in the instant case explained its reasons for granting defendant's motion. The court's reasons were based upon the evidence presented and relevant legal authority. There is no indication that the trial court granted the motion because it felt that the prosecutor should have charged the case differently. For instance, after granting the motion for a new trial, the trial court stated that it was "going to send this to the master calendar . . . [d]epartment."



The trial court did not comment that the prosecution should drop the charges or amend the information; rather, it appeared that the court expected the new trial to proceed as previously charged. Therefore, the trial court did not imply that it was granting the motion for a new trial due to a belief that the case had been overcharged, but instead, due to a finding that the evidence presented at the trial was insufficient.

#### DISPOSITION

The order granting a new trial as to the assault with a deadly weapon conviction (§ 245) is reversed. In all other respects, the judgment is affirmed.

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/s/ MILLER  
J.

We concur:

/s/ McKINSTER  
Acting P. J.

/s/ KING  
J.